

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

HOUSE BILL 699

47TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2005

INTRODUCED BY

Rick Miera

AN ACT

RELATING TO EMPLOYMENT; ENCOURAGING REPORTING OF SUSPECTED
IMPROPER QUALITY OF PATIENT CARE; PROHIBITING EMPLOYER
RETALIATORY ACTION IN CERTAIN CIRCUMSTANCES; PROVIDING
GRIEVANCE PROCEDURES AND PENALTIES; DECLARING AN EMERGENCY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE.--This act may be cited as the
"Conscientious Health Care Employee Protection Act".

Section 2. PURPOSE.--It is the purpose of the
Conscientious Health Care Employee Protection Act to maintain
and improve a high level of health care throughout New Mexico
by encouraging health care professionals to notify appropriate
public bodies of suspected improper quality of patient care.
This reporting is encouraged in order to protect patients and
employees and to assist public bodies charged with ensuring

.153678.1

underscoring material = new
[bracketed material] = delete

underscored material = new
[bracketed material] = delete

1 that health care is safe and adequate.

2 Section 3. DEFINITIONS.--As used in the Conscientious
3 Health Care Employee Protection Act:

4 A. "commission" means the human rights commission
5 established by Section 28-1-3 NMSA 1978;

6 B. "director" means the director of the division;

7 C. "division" means the human rights division of
8 the labor department;

9 D. "employee" means a health care professional who
10 performs services for and under the control and direction of an
11 employer for wages or other remuneration;

12 E. "employer" means a person who has four or more
13 employees and includes an agent of an employer and a public
14 employer;

15 F. "health care professional" means a person
16 licensed pursuant to Chapter 61, Articles 2, 3, 4, 5A, 6, 7A,
17 8, 9, 9A, 10, 10A, 11, 12A, 12B, 12C, 12D, 13, 14A, 14B, 14C,
18 14D, 14E and 31 NMSA 1978;

19 G. "improper quality of patient care" means any
20 practice, procedure, action or failure to act on the part of an
21 employer that violates any law, practice, act or rule;

22 H. "public body" means any state government
23 department, agency or political subdivision;

24 I. "retaliatory action" means the discharge,
25 suspension, demotion, disciplining or any discriminatory or

.153678.1

underscoring material = new
[bracketed material] = delete

1 adverse employment action against an employee in the terms and
2 conditions of employment; and

3 J. "secretary" means the secretary of labor.

4 Section 4. EMPLOYER RETALIATORY ACTION PROHIBITED.--An
5 employer shall not take any retaliatory action against an
6 employee because the employee does any of the following:

7 A. discloses, or threatens to disclose, to an
8 employer or to a public body an activity, policy or practice of
9 the employer that constitutes improper quality of patient care;

10 B. provides information to, or testifies before,
11 any public body as part of an investigation, hearing or inquiry
12 into improper quality of patient care, a violation of law, or a
13 rule promulgated pursuant to law; or

14 C. objects to or refuses to participate in an
15 activity, policy or practice that:

16 (1) is in violation of a law, or a rule
17 promulgated pursuant to law;

18 (2) constitutes improper quality of patient
19 care; or

20 (3) is fraudulent or criminal.

21 Section 5. GRIEVANCE PROCEDURE.--

22 A. An employee claiming to be subject to a
23 retaliatory action prohibited by the Conscientious Health Care
24 Employee Protection Act, after exhausting all other
25 administrative grievance procedures, may file with the division

.153678.1

underscoring material = new
[bracketed material] = delete

1 a written complaint that shall state the name and address of
2 the person alleged to have engaged in the retaliatory action,
3 all information relating to the retaliatory action and any
4 other information that may be required by the commission. All
5 complaints shall be filed with the division within sixty days
6 after the alleged retaliatory action was committed.

7 B. The director shall advise the respondent that a
8 complaint has been filed against the respondent and shall
9 furnish the respondent with a copy of the complaint. The
10 director shall promptly investigate the alleged retaliatory
11 action. If the director determines that the complaint lacks
12 probable cause, the director shall dismiss the complaint and
13 notify the complainant and respondent of the dismissal. The
14 complaint shall be dismissed subject to appeal as in the case
15 of other orders of the commission.

16 C. If the director determines that probable cause
17 exists for the complaint, the director shall attempt to achieve
18 a satisfactory adjustment of the complaint through persuasion
19 and conciliation. The director and staff shall neither
20 disclose what has transpired during the attempted conciliation
21 nor divulge information obtained during any hearing before the
22 commission or a commissioner prior to final action relating to
23 the complaint. An officer or employee of the labor department
24 who makes public in any manner whatever any information in
25 violation of this subsection is guilty of a misdemeanor and

.153678.1

underscoring material = new
~~[bracketed material] = delete~~

1 upon conviction shall be fined not more than one thousand
2 dollars (\$1,000) or imprisoned not more than one year.

3 D. A person who has filed a complaint with the
4 division may request and shall receive an order of
5 nondetermination from the director one hundred eighty days
6 after the division's receipt of the complaint. The order of
7 nondetermination may be appealed pursuant to the provisions of
8 Section 39-3-1.1 NMSA 1978.

9 E. In the case of a complaint filed by or on behalf
10 of a person who has an urgent medical condition and has
11 notified the director in writing of the test results, the
12 director shall make the determination whether probable cause
13 exists for the complaint and shall attempt any conciliation
14 efforts within ninety days of the filing of the written
15 complaint or notification, whichever occurs last.

16 F. If conciliation fails or if, in the opinion of
17 the director, informal conference cannot result in conciliation
18 and the complainant has not requested a waiver of right to
19 hearing pursuant to the provisions of Subsection J of this
20 section, the commission shall issue a written complaint in its
21 own name against the respondent, except that in the case of a
22 complaint filed by or on behalf of a person who has an urgent
23 medical condition, who has notified the director in writing of
24 the test results and who so elects, the director shall issue an
25 order of nondetermination, which may be appealed pursuant to

.153678.1

underscoring material = new
~~[bracketed material] = delete~~

1 the provisions of Section 39-3-1.1 NMSA 1978. The complaint
2 shall set forth the alleged retaliatory action, the secretary's
3 rule or the section of the Conscientious Health Care Employee
4 Protection Act alleged to have been violated and the relief
5 requested. The complaint shall require the respondent to
6 answer the allegations of the complaint at a hearing before the
7 commission or hearing officer and shall specify the date, time
8 and place of the hearing. The hearing date shall not be more
9 than fifteen or less than ten days after service of the
10 complaint. The complaint shall be served on the respondent
11 personally or by registered mail, return receipt requested.
12 The hearing shall be held in the county where the respondent is
13 doing business or the alleged retaliatory action occurred.

14 G. Within one year of the filing of a complaint by
15 a person aggrieved, the commission or its director shall:

16 (1) dismiss the complaint for lack of probable
17 cause;

18 (2) achieve satisfactory adjustment of the
19 complaint as evidenced by order of the commission; or

20 (3) file a formal complaint on behalf of the
21 commission.

22 H. Upon the commission's petition, the district
23 court of the county where the respondent is doing business or
24 the alleged retaliatory action occurred may grant injunctive
25 relief pending hearing by the commission or pending judicial

.153678.1

underscored material = new
[bracketed material] = delete

1 review of an order of the commission so as to preserve the
2 status quo or to ensure that the commission's order as issued
3 will be effective. The commission shall not be required to
4 post a bond.

5 I. The complainant may seek a trial de novo in the
6 district court in lieu of a hearing before the commission,
7 provided that the complainant requests from the director, in
8 writing, a waiver of the complainant's right to hearing within
9 sixty days of service of written notice of a probable cause
10 determination by the director. The director shall approve the
11 waiver request and shall serve notice of the waiver upon the
12 complainant and respondent. The complainant may request a
13 trial de novo pursuant to Section 39-3-1 NMSA 1978 within
14 thirty days from the date of service of the waiver. Issuance
15 of the notice shall be deemed a final order of the commission
16 for the purpose of appeal pursuant to Section 39-3-1.1 NMSA
17 1978.

18 J. For purposes of this section, "urgent medical
19 condition" means any medical condition as defined by an
20 appropriate medical authority through documentation or by
21 direct witness of a clearly visible disablement and that poses
22 a serious threat to the life of the person with the medical
23 condition.

24 Section 6. HEARING PROCEDURES.--

25 A. The respondent to a complaint made pursuant to

.153678.1

underscoring material = new
~~[bracketed material] = delete~~

1 Section 5 of the Conscientious Health Care Employee Protection
2 Act may file a written answer to the complaint, appear at the
3 hearing, give testimony and be represented by counsel and may
4 obtain from the commission subpoenas for any person or for the
5 production of any evidence pertinent to the proceeding. The
6 complainant shall be present at the hearing and may be
7 represented by counsel. Each party shall have the right to
8 amend the party's complaint or answer.

9 B. A panel of three members of the commission
10 designated by the chairman shall sit, and a decision agreed
11 upon by two members of the panel shall be the decision of the
12 commission. However, a commissioner who has filed a complaint
13 shall not sit on the panel hearing the complaint filed by the
14 commission. Hearings also may be conducted by a hearing
15 officer employed by the division or, if the hearing officer is
16 unavailable, one member of the commission may be designated by
17 the chairman to act as a hearing officer. A hearing officer
18 shall have the same powers and duties as the commission as set
19 forth in Paragraph (2) of Subsection A of Section 28-1-4 NMSA
20 1978.

21 C. The complainant or the complainant's
22 representative shall present to the commission or the hearing
23 officer the case supporting the complaint. No evidence
24 concerning prior attempts at conciliation shall be received.
25 The director shall not participate in the hearing, except as a

.153678.1

underscoring material = new
[bracketed material] = delete

1 witness.

2 D. The commission and the hearing officer shall not
3 be bound by the formal rules of evidence governing courts of
4 law or equity but shall permit reasonable direct examination
5 and cross-examination and the submission of briefs. Testimony
6 at the hearing shall be taken under oath and recorded by tape
7 or otherwise. Upon the request of any party, testimony shall
8 be transcribed; provided that all costs of transcribing shall
9 be paid by the party so requesting. Each commissioner and
10 hearing officer may administer oaths.

11 E. Upon the conclusion of a hearing conducted by a
12 hearing officer, the hearing officer shall prepare a written
13 report setting forth proposed findings of fact and conclusions
14 of law and recommending the action to be taken by the
15 commission. The hearing officer shall submit the report to a
16 review panel consisting of no more than three members of the
17 commission designated by the chairman. A commissioner shall
18 not sit on the panel reviewing the hearing officer's report
19 issued in connection with a complaint filed by the
20 commissioner. A decision by a majority of the members of the
21 review panel shall be the decision of the commission. If the
22 commission finds from the evidence presented at any hearing
23 held pursuant to this section that the respondent has engaged
24 in a retaliatory action, it shall make written findings of
25 fact, conclusions of law and its decision based upon the

.153678.1

underscoring material = new
[bracketed material] = delete

1 findings of fact and conclusions of law. The commission may
2 adopt, modify or reject the proposed findings of fact and
3 conclusions of law and the action recommended by the hearing
4 officer. Within five days after any order is rendered by the
5 commission following a hearing, the commission shall serve upon
6 each party of record and the party's attorney, if any, a
7 written copy of the order by certified mail to the party's
8 address of record. All parties shall be deemed to have been
9 served on the tenth day following the mailing. As part of its
10 order, the commission may require the respondent to pay actual
11 damages to the complainant and to pay reasonable attorney fees,
12 if the complainant was represented by private counsel, and to
13 take such affirmative action as the commission considers
14 necessary, including a requirement for reports of the manner of
15 compliance.

16 F. If the commission finds from the evidence that
17 the respondent has not engaged in a retaliatory action, it
18 shall make written findings of fact and serve the complainant
19 and respondent with a copy of the findings of fact and with an
20 order dismissing the complaint.

21 Section 7. ENFORCEMENT.--If a respondent to a complaint
22 filed pursuant to the Conscientious Health Care Employee
23 Protection Act is not complying with an order of the
24 commission, the attorney general or district attorney, at the
25 request of the secretary, shall secure enforcement of the

.153678.1

underscoring material = new
~~[bracketed material] = delete~~

1 commission's order by a district court. The proceeding shall
2 be initiated by the filing of a petition in the district court
3 where the respondent is doing business or the alleged
4 retaliatory action occurred. A copy of the petition shall be
5 served on the respondent personally or by registered mail,
6 return receipt requested. The court may make and enter upon
7 the proceedings an order to decree enforcement of the order of
8 the commission.

9 Section 8. APPEAL.--Any party may appeal the final
10 decision of the commission pursuant to the provisions of
11 Section 39-3-1.1 NMSA 1978.

12 Section 9. POSTING OF LAW AND INFORMATION.--Every
13 employer subject to the Conscientious Health Care Employee
14 Protection Act shall keep posted in a conspicuous place on the
15 employer's premises notices prepared by the division that set
16 forth excerpts of that act and other relevant information as
17 determined by the secretary.

18 Section 10. EMERGENCY.--It is necessary for the public
19 peace, health and safety that this act take effect immediately.